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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.

NEW YORK AND CUBA MAIL STEAMSHIP COMPANY,
Petitioner (Libellant-Appellee)

AGAINST

THE CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK
Respondent (Respondent-Appellant)

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, New York and Cuba Mail Steamship Company, a Maine corporation, prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Second Circuit rendered January 27, 1941, reversing an interlocutory decree in admiralty of the District Court for the Southern District of New York entered June 19, 1940 (R. 1342). That decree granted recovery to petitioner under its libel brought against respondent, The Continental Insurance Company, based on its protection and indemnity insurance policy dated March 1, 1934 in the amount of $4,600,000 covering petitioner's steamship *Morro Castle* (R. 824).

Jurisdiction

Jurisdiction is based on Section 240 (a) of the Judicial Code as amended, (28 U. S. C. 347).

The order on mandate below was entered February 17, 1941 (R. 1399).

Opinions below

The opinion of the District Court (Goddard, D. J.) is reported at 32 F. Supp. 251.

The opinion of the Circuit Court of Appeals is reported at 117 F. (2d) 404.

A petition for rehearing (R. 1382-95) was denied without opinion February 15, 1941 (R. 1397).

Summary Statement

Petitioner's claim under the policy comprehended the liabilities and expenses incurred and paid by petitioner as a result of the loss of some 123 lives, many personal injuries and various property losses following the fire (origin undetermined) on the *Morro Castle* the early morning of September 8, 1934, while proceeding from Havana to New York, whereby she became a total loss.

The *Morro Castle* had been built with aid of a construction loan under the Merchant Marine Act, 1928. She was owned by Agwi Navigation Company and was mortgaged to the United States as security for repayment of that loan. She was chartered bare-boat for 20 years to the petitioner as operator (Exs. 79, 80, R. 898). Both these companies were subsidiaries of Atlantic Gulf and West Indies Steam-

ship Lines, in whose favor as well as theirs, and in favor of the United States as mortgagee, the respondent's policy ran.

Policy in Suit

Respondent's Protection and Indemnity policy of March 1, 1934 provided:

"The Assurers hereby undertake to make good to the Assured or the Assured's executors, administrators and/or successors, all such loss and/or damage and/or expenses as the Assured, without their *actual* fault or privity, shall have become liable to pay and shall pay as shipowners or as having an interest in the vessel named herein on account of the liabilities, risks, events, happenings and/or occurrences herein set forth:" (Italics ours.)

(Here in a succession of 14 numbered items followed specifications of liability assumed by respondent —for death, personal injury, property losses, expenses, etc.)

• • • • •

"General Conditions and/or Limitations

* * * that in respect of any occurrence likely to give rise to a claim under this policy, the Assured are obligated to and shall take such steps to protect his (and/or the assurers') interests as would reasonably be taken in the absence of this or similar insurance.

• • • • •

The Assurers shall not be liable to the Assured for any loss, damage, or expense to which the Assured, or the *managing officers* of his organization are privy, or which arises from his or their act or neglect." (Italics ours.)

Said policy covered the *Morro Castle* liability up to $4,600,000 from February 20, 1934, to February 20, 1935.

She had been thus insured with respondent since August 15, 1930, originally for $5,000,000, reduced to $4,600,000 from February 20, 1933.

Changes in privity clause

The word "actual" had first been inserted before "fault or privity" in the February 20, 1933, policy and the word "managing" had been inserted before "officers" by an indorsement dated July 7, 1931, on the 1930-31 policy.

"Actual" fault is in sharp contrast with imputed fault.

Petitioner's steamship *Oriente* had substantially the same construction and insurance history as the *Morro Castle.* Following the *Morro Castle* fire the *Oriente* policy for the year 1935-1936 was amended by inserting "or managing agent", so that the condition against liability then read:

> "The Assurers shall not be liable to the Assured for any loss, damage, or expense to which the Assured, or a managing officer *or managing agent* of its organization is privy, or which arises from its or their act, design or neglect." (Italics ours.)

In the 1936-1937 *Oriente* policy "actual" was eliminated before "privity".

Thus *at the time of the fire* the scope of "fault or privity" in the *Morro Castle* policy was limited by "actual", and the category of persons whose "act or neglect" might charge the corporation with privity was limited to "managing officers," and did not include a "managing agent". The policy was revised to include such agent in February 1935, *after* the fire.

The "managing officer" of petitioner, a large company operating many ships, was Henry E. Cabaud, Vice President. Among the several subordinates employed by petitioner for its several vessels and under the jurisdiction of Vice President Cabaud was Thomas Torresson, the marine superintendent. Cabaud had complete supervision, and went on board each time the vessel was in New York.

Operations under U. S. Steamboat Inspectors

The *Morro Castle* had been in charge of an experienced and competent master (Willmott), who died suddenly early in the evening of September 7, 1934, whereupon the command of the *Morro Castle* was taken over by her chief officer (Warms)—about 6½ hours before the fire was discovered. Up until this time Warms was acting solely under the instructions of Captain Willmott.

Captain Willmott had reported monthly to the U. S. Steamboat Inspectors at New York concerning exercise and drill of the crews, condition of the vessel and her equipment, and otherwise as required by the regulations of the Department of Commerce (Ex. 54, R. 877). Also, in accordance with the regulations, the U. S. Steamboat Inspectors at New York had periodically inspected the vessel, and had required the officers and crew to exercise and drill in their presence (R. 665-70; 694-7; 751-5; 767-9; 774-5). The entries in the ship's logs with reference to fire and boat drills and in other respects were periodically examined and found satifactory by the Inspectors (R. 676; 761). At no time was any criticism or complaint made by the Steamboat Inspectors, either to those connected with the ship or

petitioner's shore forces, that the discipline on the ship under the jurisdiction of her master was otherwise than it should have been to accord with the safety statutes and regulations.

We annex hereto in Appendix C excerpts from the evidence concerning inspections by the U. S. Steamboat Inspectors.

Although Captain Wilmott had been instructed that the crew be divided into equal watches, the division of the watches on the *Morro Castle,* made pursuant to his instructions, was shown at the trial not to be in accord with the equal watch statute, 46 U. S. C. 673 (Finding 11, R. 1335). It also developed on the trial that on the *Morro Castle* it had been so arranged that only three of the seven men signed on as watchmen were under the direct charge of the officer in command, in violation of the regulations; that during fire and boat drills at sea not all of the crew went to their stations, and that at the time of the fire two deck hydrants had no hose attached to them and three others were capped in violation of the regulation which requires hydrants be kept "ready for immediate service."

The manager and representatives of respondent's Safety Department visited the ship from time to time and had full facility of inspection (R. 798-815; 842-76).

District Court Proceedings

Petitioner brought a limited liability proceeding in October, 1934, in the District Court for the Southern District of New York. In the concourse of claimants there established, a complete settlement was made of all the claims and a final decree entered thereon (R. 826), under which

petitioner paid to claimants $890,000 in discharge of all its liabilities. The expenses of petitioner were $229,817.12. Respondent refused to pay under its insurance policy, after due proofs of loss. Libel was therefore filed by petitioner against respondent in the District Court for the Southern District of New York December 7, 1937.

The case was tried before Goddard, D. J., February 6-21, 1939. The District Court filed its opinion in favor of petitioner March 12, 1940 (R. 1301-29), and made detailed findings of fact and conclusions of law in accordance with Admiralty Rule 46½ June 19, 1940 (R. 1340-41). Interlocutory decree was thereupon entered, wherein a commissioner to fix the damages was appointed (R. 1342-3).

For the convenience of this Court the findings and conclusions are included in Appendix A hereto.

The District Court found that neither petitioner nor any of its managing officers was chargeable with privity to any of the acts of negligence that gave rise to the disaster, or to the violations of safety statutes and regulations on shipboard that had taken place. The Court found that those violations would have prevented petitioner, because of R. S. 4493, 46 U. S. C. 491, from limiting liability under R. S. 4283, 46 U. S. C. 183, without reference to any question of privity.*

That is to say, petitioner was held liable for passengers' *full* damages because of the violations of safety statutes and regulations at sea by the ship's personnel, which violations petitioner could not have proved did not somehow cause or contribute to the loss. *The Pennsylvania*, 19 Wall.

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* These statutes are quoted in Appendix B.

125. This was irrespective of any question of statutory privity under R. S. 4283, which question was not in issue in the District Court. This is clear from the fact that the recovery granted on the crew claims was on the basis of limited liability therefor.

In other words, it was because of the condition imposed on R. S. 4283 by R. S. 4493 that petitioner was liable in full to passenger claimants, rather than because of privity under R. S. 4283. Judge Goddard considered (R. 1324) that *Butler* v. *Boston,* 130 U. S. 527 had left open the question as to the effect of R. S. 4493, which later appeared to have been ruled differently as between *Hines* v. *Butler* (4th Circ.) 278 Fed. 877 (cert. denied 257 U. S. 659) and the *Princess Sophia* (9th Circ.) 61 F. (2d) 339, (cert. denied 288 U. S. 604).

Judge Goddard said (R. 1324):

"I think that it is fairly clear that the purpose of Section 4493 of the Revised Statutes passed in 1852 must have intended to provide that such damage as came within Section 4493 was not to be subject to diminution under the Limitation Statute enacted in the previous year. The object of Sec. 4493 undoubtedly was to provide additional safeguards on vessels carrying passengers and to compel as near as possible the observance of safety laws and regulations. It seems to me that it was the clear intention of Congress to provide that if an owner violates these rules and regulations, it may not avail itself of the full benefits of the Limitation Statute but becomes liable to passengers under Sec. 4493, and that this section was intended as a supplement to Sec. 4283. The effect of Sec. 4493 is to add a further condition upon which limitation may be granted".

Under its findings the District Court held libellant entitled to recover all its loss in connection with passenger

claims, also the crew claims on limitation basis, but denied recovery in connection with cargo claims (Conclusions 5, 6, 7, R. 1341). This was notwithstanding that the settlement of its liabilities which petitioner had made with claimants was a lump sum settlement, for an amount it was prepared to show was less than the total of its liabilities. Petitioner filed cross-assignments of error (R. 1355-7) against what it deemed prejudicial limitations in said conclusions, on the appeal taken by respondent (R. 1343-52) from the interlocutory decree.

The Circuit Court of Appeals did not pass on said cross-assignments, nor did it consider the interrelation of R. S. 4493 and R. S. 4283 (R. 1377), or the conflict in the several cases mentioned by the District Judge (R. 1324).

Respondent claimed that conviction established policy privity

The principal basis for respondent's charge and defense of privity was that the petitioner corporation and Cabaud, its Vice-President, had been indicted and convicted in the District Court under Section 282 of the United States Criminal Code (18 U. S. C. 461) which reads as follows:

"*Loss of Life by misconduct of officers of vessels; liability of corporation officer.* Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed, and every owner, charterer, inspector, or other public officer, through whose fraud, neglect, connivance, misconduct, or violation of law the life of any person is destroyed, shall be fined not more than $10,000, or imprisoned not more than ten years, or both. When the owner or charterer of any

steamboat or vessel shall be a corporation, any executive officer of such corporation, for the time being actually charged with the control and management of the operation, equipment, or navigation of such steamboat or vessel, who has knowingly and willfully caused or allowed such fraud, neglect, connivance, misconduct or violation of law, by which the life of any person is destroyed, shall be fined not more than $10,000, or imprisoned not more than ten years, or both."

The elements of offense (manslaughter) by the owner are seen to be different from the elements of offense by an executive officer. In either category the destruction of a single life by the specified causes is enough to support charges under the statute.

Captain Warms and Chief Engineer Abbott of the *Morro Castle* were both indicted and tried at the same time with petitioner and Cabaud. Although convicted and sentenced to prison, their convictions were reversed in the Circuit Court of Appeals, 89 F. (2d) 166, substantially on the ground that the statutory violations which had taken place on the *Morro Castle* did not involve them, but only Captain Willmott. The appeals of petitioner and Cabaud were withdrawn before argument of the appeals of Warms and Abbott. Prison sentence adjudged against Cabaud had been suspended by District Judge Hulbert, although the fine against him as well as the petitioner was permitted to stand. This leniency to Cabaud by Judge Hulbert, in contrast to non-suspension of his prison sentences against Warms and Abbott, suggests a belief on his part that actual fault was attributable to action taken or not taken on ship-

board at sea in connection with the fire rather than to any acts or omissions of Cabaud, who was not on board.*

Petitioner contested admission of the conviction by the District Judge because it had no relevancy in the suit against respondent on the insurance policy, emphasizing that petitioner's claim was not based on an illegal act, and that the conviction was no evidence of privity under the policy, which did not mention statute violations as bearing on privity. The District Judge nevertheless admitted the same as *prima facie* evidence, apparently on the theory of the dictum in *Schindler* v. *Royal Insurance Co.*, 258 N. Y. 310, but held that any effect it had was overcome by the other evidence in the case (R. 1328).**

Circuit Court of Appeals Decision

Confusion of statute with policy

The Circuit Court of Appeals (opinion by Clark, C. J.) swept aside the express finding of fact (Finding 18, R. 1339-

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* Finding 8 of the District Court reads (R. 1333-4):

8. The cause of the fire has never been discovered. Neither libelant nor its Managing Officer Cabaud was responsible for it. The losses were not so much due to the small fire which was discovered at 2:10, but to the failure of the *Morro Castle's* officers and crew to make prompt and sufficient use of the facilities which the ship provided for extinguishing the fire and protecting the passengers and ship; to the delay of some forty-five minutes in reporting it to the bridge; and to the violations of the safety statutes and regulations by the officers in charge of her.

** The Circuit Court of Appeals declined to give effect to the conviction, although Clark, C. J. thought that it "should have been treated as direct proof of the company's fault" (R. 1379). A. N. Hand C.J. and Swan C.J. thought otherwise; the conflict of opinion on this point is mentioned below, p.

40) made by the District Court that neither petitioner nor its managing officers were in privity. It raised marine superintendent Torresson to the category of a managing *officer* notwithstanding that the record was clear that Cabaud was the only managing officer, and Torresson a subordinate *agent* only (R. 644-5). The Court arrived at its conclusion by applying the privity decisions under the limited liability statute to interpretation of the insurance policy as concerned fault or privity of petitioner, notwithstanding the difference of language and notwithstanding the Court's own statement that "the analogy between a statutory provision for limited liability and a contract by a paid insurer to relieve its promisee of loss should not be pressed too far" (R. 1369).

The Court appears to have turned to decisions under the limitation statute because "There seem to be no explicit decisions to guide us as to the meaning of the crucial words in the policy" (R. 1369).

The Circuit Court of Appeals completely misconstrued the District Court's decision on the facts when it said: "The [District] Court held substantially with the respondent on the supporting defenses, * * * " (R. 1368). In view of the District Court's express finding against privity mentioned by the Circuit Court of Appeals itself (R. 1369) this comment of the Court is inexplicable.

After referring to decisions where statutory limitation of liability had been denied because some participation of employee managers had placed shipowners in privity under the statute, the Court said (R. 1371): "we do not think the precedents can be rendered inapplicable here by considering these persons as mere agents, or believe the con-

tracting parties had in mind *some subtle gradation of managerial officers''* (Italics ours). As to this it is right to inquire now what purpose the several studied alterations in the policy could have had if not to make an agreed classification which would be controlling on questions under the policy, independent of other questions. There was no "subtle" or other gradation, but an explicit limitation to "managing officers," of which class Torresson was not one.

The footnote of the opinion (R. 1370) wholly misses the point: the "formula applicable to a situation such as Torresson's" made fault by him as a "managing agent" material on privity only *after* February 20, 1935*, but not *before* that. For it was not until after the fire that the formula applicable to Torresson ("or managing agent") was introduced into the policy. Being an agent only and not an officer, he was excluded from the 1934 policy as concerned privity.

The Court implies that the emphasis in the phrase "managing officer" is on act of management, regardless of by whom. The history of the phrase shows otherwise. Originally the phrase dealt with privity of "officers", later the limiting word "managing" was inserted before "officers." Thus in genesis the privity clause was concerned only with "officers," later with only those officers that performed managerial functions; then, after the fire, it was extended to include persons like Torresson, by the words "or managing agent."

The Court suggested that petitioner "for natural reasons" had "called as few witnesses as possible" (R. 1372).

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* The *Morro Castle* fire was September 8, 1934.

Aside from the error of this comment, it does not appear from anything stated by the Court how additional witnesses would have helped right determination of the issues. The District Judge had not suggested any shortage of material witnesses, and as the end of the trial approached it was evident that the Court considered the evidence complete. Both Cabaud and Torresson testified before him, they being the persons on whom the privity issues revolved. Such of the earlier testimony of chief officer Warms, acting master at the time of the fire, as was desired by the respondent was stipulated into the record (R. 489).

The Court also said (R. 1375): "The president of libellant, a Mr. Mooney, saw one drill, but was not called." This statement is clear error. It appears only that Mr. Mooney was on board the *Morro Castle* as a passenger on an Easter cruise in April, 1934. There is not the slightest evidence that he saw the drill. The District Judge expressly found that Mr. Mooney "did not become aware of any improper drills when he was a passenger in April, 1934" (R. 1337-8).

As to "burden of proof"

The Circuit Court of Appeals described Cabaud and Torresson together as "these officers" (R. 1372), and referred to them as *managing officers*. The Court then proceeded on several counts to condemn petitioner for failing to discharge an assumed burden of proof, implying that petitioner was bound, in respect of various instances of statutory violations which had taken place on the *Morro Castle* at sea, to establish affirmatively a complete nega-

tive of "privity" as a condition of receiving any benefits under the policy. This was notwithstanding that both Cabaud and Torresson as well as many others had testified, and notwithstanding that on all the proofs the District Judge had found that neither Cabaud, the managing officer, nor Torresson, the marine superintendent, was chargeable with fault or privity as concerned the statutory violations. This position of the Circuit Court of Appeals took all life from the policy and made it merely a shadow,—leaving to petitioner no right except to pay premiums—because the burden of establishing the negative proposition, as that burden was applied by the Court, was one impossible to discharge.

The extent to which the Court proceeded on this point is illustrated by its language (R. 1372): "We think it important, therefore, to recall that libellant could not rely on absence of evidence against these officers but was required affirmatively to show that the loss was not caused by their act or neglect." This was notwithstanding that neither Cabaud nor Torresson was on board.

In these circumstances no such burden rests on a petitioner even under the limited liability statute. Why the burden should be heavier in a suit against the underwriter is not explainable, inasmuch as the insurance protection is illusory unless it covers where statutory limitation is denied.

Apparently in recognition of the excess burden thus placed on petitioner, the Court said (R. 1374-5):

"The words of the policy here go somewhat beyond the limitation statute, in that they expressly except liability for loss which arises only from the neglect of the assured or the managing officers of its organization. Torresson's

neglect here was a neglect of the libellant which is inexcusable where dangers at sea are involved and which excludes liability upon the policy"

The Court thus denied recovery to petitioner by imputing Torresson's assumed neglect to petitioner and calling that actual privity.

If it be assumed that there was a neglect on the part of Torresson which would have foreclosed petitioner from limiting liability under the statute, that nevertheless would not justify forfeiture of petitioner's right to recover under the policy. It could only be by some neglect imputed to the assured that a liability could arise at all as a basis for claim under the policy. Torresson's neglect (if assumed) was not as of a *managing officer,* but as a mere *employee agent,* and it was excluded from being privity according to the express and obviously deliberate language of the policy.

The Court could reach its decision only by elevating Torresson to the status of managing officer from his position of employee only. In doing this the Court went directly against the language of the policy, the findings, and against the clear understanding of the District Court and Counsel there (R. 644-5). We quote the remarks in our brief annexed, *infra,* pp. 38-9.

As to reading logs

The principal fault attributed by the Court to Torresson was that he had failed to inspect the log books concerning division of watches (R. 1374). However, it was not disputed that proper instructions had been given to the master concerning division of watches, and that the U. S. Steamboat Inspectors regularly examined the log books and were

satisfied. Furthermore, the District Judge had found (R. 1335) that examination of the log books by Torresson would not have disclosed that instructions on division of watches had not been observed by the master, under whose control that matter rested. No statute or regulation required log entry of the number or names of the men on watch.

Concerning Cabaud, the Court suggested that a broader issue was presented than merely of his actual knowledge of the statutory violations, and indicated that he could not disclaim actual fault or privity therefor by delegation of functions to Torresson without taking steps "to see that his subordinate acts," so that failure of supervision "is neglect upon the part of the company". This emasculated the privity clause by eliminating "actual" therefrom. The Court's comment related to the statement that as concerned division of watches, the ship's logs, open to Cabaud and Torresson, showed consistent violations (R. 1377). This was directly contrary not only to the fact but also to the finding of the District Judge (R. 1335), "However, the log books would not have shown whether the instructions as to dividing the crew into equal watches were observed."

The opinion does not suggest that any incident whatever as to the watches or drills had come to the attention of either Cabaud or Torresson which as matter of foresight (instead of hindsight) should have made them suspicious and have led them to examine the logs and check otherwise on the ship's discipline which was wholly in the charge of the master who was responsible therefor directly to the Steamboat Inspectors. They made their periodical check-ups with apparent thoroughness (see Appendix C).

We do not palliate or belittle the facts developed at the trial concerning violations of the statutes and regulations which had happened on the *Morro Castle* at sea. However, in the absence of a definite motive for examination of the logs by Cabaud or Torresson, in the midst of their multifarious duties, it is not clear why before September 8, 1934, they should have done it for any purpose relating to the policy, which said nothing even remotely relating to the subject. Logs may be over-written or under-written, but in any case the question is not what they state or fail to state, but what the fact was—as indicated by one of the Steamboat Inspectors (R. 678). Certainly failure of Torresson or Cabaud to examine the logs on the subject of watches and drills prior to September 8, 1934, is extremely remote from the policy issue of complicity ("actual fault or privity") in bringing about the disaster. This Court's view on log books was stated adversely to that of the Circuit Court of Appeals in *LaBourgogne,* 210 U. S. 95, 126-7, referred to below.

Difference of Opinion as to effect of the Conviction

By addendum to his opinion, Clark, C. J., showed the Court was not in accord as to effect to be given to the conviction of petitioner and Cabaud under Sec. 282 of the Criminal Code (18 U. S. C. 461) and stated his own conclusions on the problem "in view of its interest and general importance" (R. 77-9):

> "The cases are now in substantial conflict as to the effect to be given to conviction of a crime in a civil action involving the same circumstance * * *. My conclusion was that the conviction should have been treated as direct proof of the company's fault" (R. 1378-9).

A. N. Hand, C. J. with whom Swan, C. J., concurred, said (R. 1380-1) that the criminal judgment:

"ought, in my opinion, to have no effect when the issues determined thereby are not necessarily the same as those involved in the action on trial * * *. The situation is quite different from the one where an issue known to be determined in a criminal action is involved in a civil suit to which the convicted person is a party."

Questions Presented

1. Is a shipowner's policy of protection and indemnity insurance governed as concerns its reference to "privity" by the privity decisions which would be applied in a statutory proceeding under R. S. 4283, notwithstanding difference in wording* and difference in purpose as between the statute and the policy, and where the shipowner's adjudged full liability for which it claims indemnity results from R. S. 4493 (because of shipboard violations of safety statutes and regulations) irrespective of any question of statutory privity?

The Circuit Court of Appeals said (R. 1369), "There seem to be no explicit decisions to guide us as to the meaning of the crucial words in the policy", whereupon it applied decisions and reasoning which might have been

* R. S. 4283 reads "without the privity or knowledge of such owner or owners", etc. The policy reads "the Assured without their actual fault or privity * * * the Assured, or the managing officers of his organization are privy", etc. Thus Vice-President Cabaud, the managing officer, was *included*, but Torresson, the employee marine superintendent, was *excluded*, as concerned *policy* privity, although either one of them could have involved the Company in *statutory* privity under R. S. 4283. *After the fire* an amendment was made to the policy which included Torresson. See p. 4, *supra*.

relevant in a statutory limitation proceeding to this wholly different contractual situation.

2. Is not the assured shipowner under such a policy of insurance entitled to recover indemnity unless the liability in respect of which indemnity is claimed was caused by something in the nature of fraud on its part, e. g., some willful or deliberate wrong?

3. Is the assured shipowner under such a policy of insurance entitled to rely on the ordinary rules of preponderance of proof generally applied to commercial documents, or is he required, as a condition of recovering indemnity, to establish by positive proof a complete negative of everything that the assurer can charge as privity, substantially as would be required under the "did not—could not" rule of *The Pennsylvania*, 19 Wall. 125?

Reasons Relied on for Granting of the Writ

I. The decision of the Circuit Court of Appeals in this case has introduced great uncertainty into the matter of coverage, the protection and risks bargained for, and the obligations which exist as between assurer and assured under protection and indemnity policies. The questions naturally spread into other fields of liability insurance.

The insurance policy here was of a usual form as developed from many years' experience and used both for vessels privately owned and for vessels in which the Government is interested either as owner or mortgagee, the latter particularly where vessels have been constructed with Government aid under the Merchant Marine Act, as was the *Morro Castle*.

There is no branch of the law of shipping or marine insurance more important than protection and indemnity insurance, which was developed to protect shipowners, charterers and operators in a great variety of situations not coverable by ordinary marine policies. Few shipping operations of importance fail to avail of such insurance, which is of such volume that the P. & I. underwriters customarily spread their vast risks by re-insurance on substantially the same terms both in this country and abroad.

The importance of the questions is emphasized by the fact that recently the Circuit Court of Appeals for the Fifth Circuit in *Sabine Towing Co.* v. *Continental Insurance Co. Inc.*, 117 F. (2d) 694, also exonerated the same respondent under different language in a policy privity clause, where statutory limitation of liability had been denied for privity of the president of the assured. That Court was divided, McCord, C. J., dissenting. He concluded, as had the District Court for the Eastern District of Texas,

"The essential purpose of the policy is to protect the owner from loss that may arise through negligence in connection with the operation of its business. The construction placed upon the contested clause by the majority opinion is too narrow and virtually destroys the effectiveness of the policy of insurance" 117 F. (2d) at 702.

We are informed that a petition for certiorari will shortly be presented to this Court in that case.

The decision below makes the policy illusory, a mere shadow, and no protection in various contingencies that suddenly arise in the countless vicissitudes of the shipping industry, not within any direct control and certainly with-

out wrongful purpose on the part of the managerial officers of ship owning or operating corporations.

Tremendous risks are involved in vessel operation and the great and increasing values of vessel property, which if not properly covered would involve many a shipowner or operator in irretrievable financial disaster. Although the claim made on the respondent underwriter in this case is for about $1,114,000, (the claims against petitioner were asserted at upwards of $12,000,000) the policy was for $4,600,000. This figure in itself attested the seriousness of the contract, and a contemplation of the possibility of accidents which would give rise to large liabilities,—liabilities which could only be founded on some neglect to be imputed to the corporate petitioner. In the course of determining such liabilities it seems inevitable that fault should be charged against shore personnel as well as against ship personnel. When liability can be limited under the statute, claim on the underwriter is likewise limited, so it is naturally not for such instances that these larger policies are taken out.

It is greatly in the interest of the commercial community that the questions at issue be reviewed and set to rest by this Court.

The differences in view expressed between the Circuit Judges in this case and betwen the Circuit Judges in the *Sabine Towing Co.* case in the Fifth Circuit, both decisions having reversed those of the respective District Courts, in themselves create an unsatisfactory situation in a matter of such general commercial interest. It is not greatly dissimilar to the effect of contrary decisions as between two Circuits, and is analogous to the diversity of opinion which this Court referred to in *Strochmann* v. *Mutual Life Ins.*

Co., 300 U. S. 435, at 439. The decision in this case unduly confines the protection, according to the insurance trade understanding of this type of policy (R. 212-13, 216-17) and the same appears from the *Sabine Towing Co.* case.

II. The Court in classifying petitioner's employee-agent, marine superintendent Torresson, as a "managing officer" under the policy violated the clear intent and purpose of the policy as developed by amendments over a period of years. The amendments made in the 1935-36 policy, *after* the loss, specifically include a managing agent (*e.g.*, a marine superintendent), as one whose actual fault or privity would defeat recovery by the assured, but before that time he was excluded from that category—which on September 8, 1934 was by the policy limited to a managing officer (Cabaud, but not Torresson).

Comment

It is fundamental that the construction most favorable to the assured as against the assurer preparing a policy "must be adopted" *American Surety Co.* v. *Pauly*, 170 U. S. 133, 144. *Stroehmann* v. *Mutual Life Ins. Co.*, 300 U. S. 435, 439. This principle forbade that the marine superintendent, a mere agent of petitioner, should be transformed into a managing officer for the purpose of attributing fault or privity to petitioner, notwithstanding that he had managerial duties assigned to him by Vice-President Cabaud, managing officer. In *The Galileo*, 287 U. S. 420, 425, a case under the fire statute, Mr. Justice Brandeis referred to "negligence of its *managing officers or agents*" (italics ours) a clear recognition of the distinction between

an "officer" and an "agent." This clear distinction, as of the time of the fire, was recognized expressly by respondent when it amended its 1935-36 policy on the *Oriente* so as to add "or managing agent." That would have been wholly unnecessary if "managing officer" as used in the 1934 policy had not definitely excluded the acts of all others as concerned any questions of policy privity.

It is wholly immaterial in this suit on the policy that the negligence of a "managing agent" can prevent limitation under the statute, as well as the negligence of a "managing officer." That circumstance does not blend the two classifications into one, to the prejudice of the assured, against the carefully worked-out language of the policy itself.

The privity clause should never be so interpreted or applied as to defeat the broad commercial and protective purposes of the policy when fraud is not involved. This emphasizes the indefensibility of making the fault or privity of an "agent" the same for policy purposes as that of a "managing officer," notwithstanding separation of the person classifications in the policy itself.

III. The Court defeated petitioner's insurance contract claim against respondent on the ground raised by it that limitation of liability would have been denied to petitioner on privity grounds under R. S. 4283. The District Court found there was no privity and held that R. S. 4493 prevented petitioner from limiting liability irrespective of any question of privity.

Comment

Strict construction of the limited liability statute which is in *derogation* of the rights of the traveling and shipping public may on occasion be justified in order to avoid inequitable hardship to that public. The situation as between the petitioner and respondent is vastly different and there is nothing to justify *derogation* of petitioner's right to recover by favoring respondent with a restrictive rule of construction to avoid its liability.

The public aspect of the matter is evident from the fact that under Section 109 [now 167] of the New York Insurance Law persons who might establish claims against a carrier (petitioner) had rights to recover under this policy in the event of inability of the carrier (petitioner) to pay their claims. *Hinkle* v. *Globe and Rutgers Ins. Co.*, 271 N. Y. 585.

The P. & I. policy had real and commensurate value to the petitioner only if it covered liability based on losses from which petitioner was not exempt under the limitation statute. Unless such a policy covers a field broader than the statute it is not insurance but a mere sham, and petitioner paid premiums on a $4,600,000 policy to no purpose.

This policy applied to liability that might arise in respect of cargo carried, and other matters, in addition to passenger liability. Both the Harter Act of 1893 and the Carriage of Goods by Sea Act of 1936 exempt the carrier from cargo liability for negligence in managament and navigation. The Fire statute, R. S. 4282 (46 U. S. C. 182) exempts the carrier from liability for loss of cargo by fire, which exemption includes losses due to negligent custody and all other negligence, unless the fire be shown due to the

carrier's design or neglect. P. & I. protection in respect of cargo is thus only required against the negligence of shore personnel or negligence of ship's personnel in care and custody. The regular marine policies take care of collision damage to other vessels, so such damages are not the subject of the P. & I. policy.

It is therefore apparent that the policy would afford little protection against cargo claims if the Court below was right in holding that it protects only where the shipowner can limit liability under the limitation statute.

IV. The Court refused to hold that the only defense to petitioner's claim on the policy would be something amounting substantially to fraud against respondent by petitioner or by its managing officer Cabaud, and that "actual fault or privity" in the policy meant no more or less than this, that is to say, corrupt or evil purpose contributing to the disaster, transcending mere negligence in performance of managerial functions, which negligence could not proximately cause or have more than a remote collateral bearing on the disaster.

Comment

A fair and substantial description of the purpose of protection and indemnity insurance and of the nature of defenses which should prevail against policy claims is given in *Hanover Fire Ins. Co.* v. *Merchants Transportation Co.*, 15 F. (2d) 946, *certiorari* denied 273 U. S. 758, where the Circuit Court of Appeals for the Ninth Circuit said (948):

"The object of this form of insurance is to afford protection to shipowners, in addition to that afforded by the

ordinary marine policy, and the contract should be construed with that object in view. When so construed, we are clearly of opinion that it covered damages paid for loss of life arising from the negligence of the ship or shipowner; for, in the absence of negligence on the part of either, there would be no loss or liability to be indemnified against. And, if the policy covered loss arising from negligence, the courts will not attempt to distinguish between the different kinds or degrees of negligence, unless, as agreed by counsel, the negligence was so gross as to amount to a willful, deliberate, and intentional wrong.

Negligence of the latter class would constitute fraud as against the insurance company."

To like effect is *Sorenson* v. *Boston Ins. Co.*, 20 F. (2d) 640, *certiorari* denied 275 U. S. 554; *Moore* v. *Eagle Star, etc. Ins. Co.*, 5 F. (2d) 385, aff'd 9 F. (2d) 296.

Considering that contracts of insurance should be interpreted and applied broadly to afford to assureds the benefits which alone justify such insurance, there was no reason for the court below to assume that the policy in suit differed in principle from those involved in the cases just cited, notwithstanding the insertion of the privity phrase. That should not have been given any special significance other than as a specific *caveat* in the policy against matters (*i. e.*, fraud, broadly speaking) which would on fundamental principles constitute a defense even without such specific statement. Especially was this true since the privity clause was amended by insertion of "actual" *before* the fire, and by the withdrawal of "actual" *after* the fire.

In *Waters* v. *Merchant's Louisville Ins. Co.* (1837) 11 Peters 213, 221, Mr. Justice Story said:

"There is nothing unreasonable, unjust, or inconsistent with public policy, in allowing the insured to insure himself against all losses from any perils not occasioned by his own personal fraud."

The remarks of Cardozo, J., then Chief Judge, in *Messersmith* v. *American Fidelity Co.*, 232 N. Y. 161, permitting recovery of liability insurance where the liability arose from injury by an automobile driven by an infant in violation of the Highway Law, show the theory and policy of recovery being granted wherein fraud is not the cause involved. The English Courts hold likewise. *James* v. *British General Ins. Co. Ltd.* [1927] 2 K. B. 311, 321; *Tinline* v. *White Cross Ass'n Ltd.* [1921] 3 K. B. 327, 330-2. Both of these cases involved convictions for manslaughter resulting from gross or criminal negligence, but negligence nevertheless, and not wilful or advertent acts—*i.e.*, not based on fraud or other moral turpitude.

V. The Court held that petitioner had a burden of proof to show and had failed to show that the failure of Cabaud or Torresson to become aware of violations of safety statutes and regulations on the *Morro Castle* was not the actual fault or privity of petitioner within the intent of the policy. It made this conclusion without the slightest evidence, or legal basis, that such non-awareness on their part was, or could be, in any relevant sense a cause ("actual fault or privity") of the liabilities for which petitioner sought to be reimbursed.

Comment

Nothing in the policy specified or suggested that petitioner could be subjected to a burden of proof in the negative sense, *i.e.*, that no recovery could be had unless petitioner should affirmatively establish the negative of every contention set up by respondent as to why its liability

should be avoided. Interpreting the policy in that sense converted it into no insurance at all, and foreclosed that protection by respondent for which petitioner paid premiums.

There is no fair reason to suppose that the phrase "without their actual fault or privity," etc., was other than a description of a proximate cause or causes of loss which, if shown on all the evidence to exist, would avoid protection of the policy. It should not be presumed that in a matter of this importance either the petitioner or respondent intended to hamstring themselves by a mere rule of procedure in a law suit. It is inconsistent with broad rules of common sense that the right of petitioner to recover on the insurance policy should be restricted more by a mere rule of procedure implied from the policy than would be the case in the statutory limited liability proceeding.

It should not be forgotten that the *Morro Castle* liabilities resulted proximately from the fire on board and the several contingencies and events following shortly thereafter, in which neither the petitioner nor Cabaud nor Torresson had any participation whatsoever.

In *La Bourgogne*, 210 U. S. 95, this Court refused to uphold a contention there made for claimants in a limited liability proceeding (97), that an allegation that the loss occurred without privity or knowledge of the petitioner could not be:

"established without proving the negative of any matter of privity or knowledge that is put in issue."

In the 1936 Carriage of Goods by Sea Act, 46 U. S. C. 1304, specifications are made in Sec. 4 as to burden of

proof when certain exemptions are claimed. See Brief at pp. 42-3. Petitioner should surely be in no less favorable position under the policy than it would be under that statute.

What the Court below in reality did was to subject the petitioner to the "did not-could not" rule in cases of statutory fault as expressed in *The Pennsylvania,* 19 Wall. 125. The decision in *Richelieu & Ontario Nav. Co.* v. *Boston Marine Ins. Co.,* 136 U. S. 408 cited below, (R. 1371) was based on *The Pennsylvania.* The stranding in that case was by the applicable Canadian statute "deemed to have been occasioned by the wilful fault of the person in charge" (422). As the policy expressly excepted perils occasioned by want of ordinary care or seaworthiness, the rule of *The Pennsylvania* was naturally applied (423); in other words, violation of the Canadian statute against excessive speed raised a *prima facie* case of negligent navigation and the policy excluded negligent navigation. The same comment applies to the other cases relied on by the court below at R. 1371.

"Mutilating narrowness" ought to be avoided as well in respect of contracts as of statutes, and the purpose of the contract as well as of a statute should be the main regard. *United States* v. *Hutcheson,* 61 Sup. Ct. Rep. 463, 467; *Warner* v. *Goltra,* 293 U. S. 155.

VI. The Court attributed a causal effect amounting to "actual fault or privity" in respect of the liabilities incurred by petitioner *in the sense of the policy,* to failure of petitioner's marine superintendent, Torresson, to examine the logs of the *Morro Castle* on the subject of division of watches and drills and to failure of managing officer

Cabaud to supervise him in that respect, notwithstanding that proper instructions had been given to the master on that subject, notwithstanding the absence of any incident to indicate that the master was failing to observe the instructions, and notwithstanding that this matter was under the jurisdiction of the U. S. Steamboat Inspectors to whom the master reported regularly, and who examined the logs.

Comment

The District Judge found that examination of the logs would not have shown whether the law as to division of watches was being violated on shipboard or not (R. 1335). It was not a violation of any statute or regulation for the master not to enter in the log the number or names of men on watch. Keeping of the logs and control of the same were for the master under R. S. 4290, 46 U. S. C. 201-203. The entries prescribed to be made do not include the number or names of men on watch.

The opinion clearly errs in stating (R. 1377) that "the ship's logs, equally open to Cabaud as to Torresson, show consistent violations." All that an examination of the logs would have shown was that Torresson's instruction to the master to show division of watches with entry of names in the log was not carried out, not that there had been any violation of law. This instruction as to entry of names was voluntary on the part of Torresson, it was not required by the statute or any regulation. There is nothing to suggest that it was known to Cabaud.

In the absence of any incident calling for particular attention, it is not apparent why Torresson or any other sub-

ordinate (much less Cabaud) should have scrutinized the logs. It should be remembered that the operation of the *Morro Castle* had been smooth and successful, and without special incident.

Whether a log is written up full or scant depends largely on the disposition and direction of the particular master. Overwriting of a log, if that sometimes happens, does not establish facts, nor does scant writing controvert them.

There is no suggestion in the case at bar that promulgation of instructions as to division of watches on the *Morro Castle* was not done in good faith, or that a willful departure from such instructions by the master was brought home to or countenanced by petitioner. This Court's decision in *La Bourgogne,* 210 U. S. 95, 126-7, shows that petitioner had fully done its part, and was not in privity as concerned the respondent by reason of what the log books failed to show either one way or the other in respect of whether the watches on shipboard had been properly divided or not, or in respect of other matters.

VII. The Court did not give due weight to but disregarded, the findings of the District Judge under Admiralty Rule 46½, and substituted its own views which were to the contrary of said findings.

VIII. The Court erroneously failed to pass on petitioner's cross-assignments of error (R. 1355-7).

Petitioner annexes a brief hereto.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of

Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its dockets "No. 116 October Term 1940, New York and Cuba Mail Steamship Company, Libellant-Appellee, against The Continental Insurance Company of the City of New York, Respondent-Appellant," and that the decision of the said Circuit Court of Appeals in said case be reversed, and that your petitioner have such other and further relief as in the premises may be just.

NEW YORK AND CUBA MAIL STEAMSHIP COMPANY

By ROSCOE H. HUPPER
CHAUNCEY I. CLARK
Counsel

Certificate

I hereby certify that I have examined the foregoing petition, and in my opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

ROSCOE H. HUPPER
Counsel
27 William Street
New York City

New York City
April 24, 1941.